MOTION FILED
NOV 21 1985

No. 85-21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY, *et al.*,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF WESTERN FUELS ASSOCIATION, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

FREDERICK L. MILLER, JR.*
PETER GLASER
CHARLES F. HOLUM

DUNCAN, WEINBERG & MILLER, P.C.
1775 Pennsylvania Avenue, N.W.
Suite 1200
Washington, D.C. 20006
(202) 467-6370

Attorneys for Western Fuels Association, Inc.

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-21

SQUARE D COMPANY, *et al.*,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

MOTION OF WESTERN FUELS ASSOCIATION, INC., FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PETITIONERS

Western Fuels Association, Inc., moves the Court for leave to file an amicus brief in support of petitioners. The proposed brief is included in this document. Counsel for petitioners and respondents have refused to consent to the filing of the brief.

As is more fully explained in the proposed brief, Western Fuels is a fuel supply cooperative which purchases and mines coal for use in electric generating

plants owned and operated by Western Fuels' owner-members. Western Fuels' owners and members are 36 publicly and cooperatively-owned electric utilities.

Pursuant to arrangements with its members, Western Fuels typically is responsible for arranging the transportation of fuel to its members' plants. Western Fuels thus has negotiated and entered into many contract or tariff relationships with four different railroads in the middle and western part of the United States, as well as constructed short haul private railroads owned and operated through Western Fuels subsidiaries. Given its transportation responsibilities, Western Fuels has considerable experience in the coal transportation business.

Western Fuels believes that the Court's review of *Keogh* v. *Chicago & NW Ry.*, 260 U.S. 156 (1922) should include analysis of the importance of that decision to the rail movement of bulk commodities such as coal. Wholly apart from *Keogh's* significance regarding respondent rate bureau's compliance or non-compliance with the ICC approved agreement, the case has a major impact on railroad practices in setting rates and operating terms. Western Fuels explains in its proposed brief why *Keogh* has no proper present application to this part of the transportation business. While petitioner and the Solicitor General alluded to the recent changes in the regulation of railroads in their requests for certiorari, those parties do not have the same interest as Western Fuels in arguing this aspect of the *Keogh* case.

Respectfully submitted,

FREDERICK L. MILLER, JR.*
PETER GLASER
CHARLES F. HOLUM

DUNCAN, WEINBERG & MILLER, P.C.
1775 Pennsylvania Avenue, N.W.
Suite 1200
Washington, D.C. 20006
(202) 467-6370

Attorneys for Western Fuels Association, Inc.

**Counsel of Record*

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF WESTERN FUELS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. Congress Has Deregulated Railroad Rates, Thus Undermining *Keogh*'s Rationale	4
II. Rail Rates Are No Longer Approved By The ICC.	9
CONCLUSION	13

TABLE OF AUTHORITIES

CASES: Page

Burlington Northern R. Co. v. *I.C.C.*, 679 F.2d 934 (D.C. Cir. 1982), *cert. denied*, —— U.S. ——, 104 S. Ct. 2150 (1984) 11

Carnation Co. v. *Pacific Westbound Conference*, 383 U.S. 213 (1966) 9

Consumers Power Co. v. *Norfolk & Western Railroad Co.*, ICC Docket No. 378545, slip op. (Jan. 4, 1984). 10

ETSI Pipeline Project, A Joint Venture and Energy Transportation Systems, Inc. v. *Burlington Northern, Inc., et al.*, No. B-84-979-CA (E.D. Tex. filed Oct. 9, 1984) 4

Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) 9

Houston Lighting & Power Co. v. *United States*, 606 F.2d 1131 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980) 11

In re Lower Lake Erie Iron Ore Antitrust Litigation, MDL 587, Slip op. (E.D. Pa. June 5, 1985) 3, 4

Keogh v. *Chicago & NW Ry.*, 260 U.S. 156 (1922) .. 2, 9, 10, 11, 13

Potomac Electric Power Co. v. *I.C.C.*. 744 F.2d 185 (D.C. Cir. 1984) 11

Transkentucky Transportation Railroad v. *L&N R. Co.*, 581 F. Supp. 759 (E.D. Ky. 1983) 3

Western Coal Traffic League v. *United States*, 719 F.2d 772 (5th Cir.), *cert. denied*, 462 U.S. 1110 (1983) .5, 6, 11

Western Fuels v. *Burlington Northern Railroad Co.*, No. C-82-0443 (D. Wyo. Nov. 2, 1984) (Order Approving Settlement) 4

STATUTES:

49 U.S.C. § 10101(a)(1) (1985) 7

49 U.S.C. § 10707 (1985) 10

TABLE OF AUTHORITIES continued

Page

49 U.S.C. § 10709 (1985) 6, 11

49 U.S.C. § 10713(b) (1985) 10

49 U.S.C. § 10713(d) (1985) 6, 10

49 U.S.C. § 10741(f) (1985) 6

Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 ..... 2, 6, 7, 12

Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 ..... 2, 5, 7, 8

OTHER AUTHORITIES:

Regulatory Reform Legislation for the Rail Industry: Hearings on H.R. 4650 Before the Subcommittee on Interstate and Foreign Commerce, 96th Cong., 2d Sess. 4 (1980) 8

To Reform the Economic Regulation of Railroads: Hearings on S. 796 Before the Subcommittee of Surface Transportation of the Senate Committee on Commerce, Science and Transportation, 96th Cong., 1st Sess. 251 (1979) 8

H.R. Rep. No. 1430, 96th Cong., 2d Sess. 101, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4133 ..... 6, 7

S. Rep. No. 595, 94th Cong., 2d Sess. 134, *reprinted in* 1976 U.S. Code Cong. & Ad. News 148 ..... 7, 8

S. Rep. No. 499, 94th Cong., 1st Sess. 14 (1975) 7

126 Cong. Rec. 17792 (1980) 8

49 C.F.R. §§ 1039.3, 1300.13 (1983) 10

Coal Rate Guidelines, Nationwide, Ex Parte 347 (Sub-No. 1) slip op. (August 8, 1985), *appeal docketed sub nom. Consolidated Rail Corp.* v. *United States*, No. 81-3080 (3rd Cir.) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-21

SQUARE D COMPANY, *et al.*,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF WESTERN FUELS ASSOCIATION, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF WESTERN FUELS

Western Fuels Association, Inc., is a not-for-profit fuel supply cooperative whose members are publicly and cooperatively owned utilities located in twenty-six states and Puerto Rico. Western Fuels purchases and mines coal and arranges for delivery of the coal to its members' electric generating plants. Western Fuels does a significant volume of business with the nation's coal-hauling railroads.

Having negotiated and entered into many long-term coal transportation arrangements with railroads unconstrained by competition or meaningful regulatory control, Western Fuels is profoundly concerned that, under *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), railroads and other carriers lack the Sherman Act's most persuasive incentive to compete solely on the merits—private treble-damage actions. Western Fuels' members and consumers would be better served, in this time of diminishing administrative control, by full application of the antitrust laws to carriers' business practices. Western Fuels thus asks the Court to overturn or to construe narrowly its sixty-year old *Keogh* decision.

SUMMARY OF ARGUMENT

The *Keogh* doctrine, having originated in a railroad case, has been read to include the railroad and the trucking industries. Western Fuels argues that *Keogh* has limited, if any, current applicability to the railroad business.

Railroads should not continue to have almost complete rate freedom, as they do under the 4R[1] and Staggers Acts,[2] and also broad though implied antitrust immunity, nor should shippers be deprived of both administrative and antitrust remedies. Antitrust exposure is fully consistent with Congress' lessening of regulation over the past nine years. The Court's analysis in *Keogh* simply is not appropriate in the context of today's shipper-railroad disputes.

---

[1] Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (hereinafter "4R Act").

[2] Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (hereinafter "Staggers Act").

ARGUMENT

Western Fuels is one of the nation's major shippers of coal. In calendar year 1984 it shipped some 10,462,000 tons of coal to ten destinations in seven states, not including spot sales. Electricity generated in plants burning coal provided by Western Fuels serves consumers in twelve states.

When Western Fuels was incorporated, in 1974, in order to aid its members' acquisition of low-sulfur western coal, its representatives immediately began the arduous task of negotiating coal transportation arrangements with the coal-hauling railroads. Western Fuels continues to negotiate with these railroads, for extensions of service and for movements to new destinations. These negotiations are inevitably exceedingly difficult to bring to fruition. Since the mid-1970's, the railroads have had little incentive to agree on rates and other important terms, particularly for movements from captive or single-service origins or for movements to captive destinations. The Interstate Commerce Commission ("Commission" or "ICC"), at the direction of Congress, has allowed the railroads to price their services with little if any regulatory or cost-based restraint.

At the same time that the railroads have been increasingly unfettered, transportation alternatives, such as short-haul railroads, and slurry pipelines, have been legislatively and otherwise restricted, in large part through the efforts of the railroads.[3] Western Fuels

---

[3] *See, e.g., Transkentucky Transportation Railroad* v. *L&N R. Co.*, 581 F. Supp. 759 (E.D. Ky. 1983) (antitrust suit over railroads "illegal acts and obstructive tactics" to foil competition from short-rail and barge project); *In re Lower Lake Erie Iron Ore*

ern Fuels and some of its members considered using coal slurry systems to deliver coal to the members' plants. Western Fuels, like other coal shippers, has been forced to accept less than satisfactory terms in some of its railroad relationships simply because it had no alternative to rail shipment. Western Fuels was eventually forced to file a major antitrust suit against one of the nation's largest coal-hauling railroads as its avenue of relief, since regulation by the ICC was not a realistic alternative.[4]

I. Congress Has Deregulated Railroad Rates, Thus Undermining *Keogh*'s Rationale

The Court's decision in *Keogh* was premised on two principal considerations. First, the Court was concerned about judicial interference with the Commission's finding that the rates challenged in the antitrust suit were "reasonable," since rates found to be reasonable by the ICC cannot be a basis for damages. Second, the Court was concerned about the possibility that the "hypothetical" rates used to measure plaintiff's antitrust damages might themselves be unlawful if they were discriminatory. The Court stated that "unless

Antitrust Litigation, MDL 587, slip op. (E.D. Pa. June 5, 1985) (App. B. to Respondent's Joint Brief in Opposition, Aug. 2, 1985) (antitrust suits over railroads' conspiracy to "destroy competition and monopolize dock-handling, storage and land transportation of iron ore and other commodities"); *ETSI Pipeline Project, A Joint Venture and Energy Transportation Systems, Inc.* v. *Burlington Northern, Inc., et al.*, No. B-84-979-CA (E.O. Tex. filed Oct. 9, 1984) (antitrust suit for conspiracy and other acts to prevent competition from coal slurry pipeline).

[4] *Western Fuels* v. *Burlington Northern Railroad Co.*, No. C-82-0443 (D. Wyo. Nov. 2, 1984) (Order Approving Settlement).

the lower rate was one which the carrier could have maintained legally, the changing of it could not conceivably give rise to a cause of action." 260 U.S. at 164.

At least three recent legislative changes do much to undermine the *Keogh* rationale as applied to railroad rates. Congress recently eliminated Commission jurisdiction where there is no market dominance, Congress set cost-based jurisdictional thresholds for reasonableness review, and Congress specifically found that the Interstate Commerce Act's anti-discrimination provision should not apply to railroad rate contracts.

The 1976 4R Act reduced the Commission's authority over railroad rates and substituted competition for regulation. The act stripped the Commission of its authority to declare rates "unreasonable" except where there is a showing of a "market dominance" by the carrier.

> Under the 4R Act, the ICC now has jurisdiction to review a rate only if it determines that the carrier can exclude effective competition to the extent that the carrier has "market dominance," defined as "an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies."[5]

The 1976 legislation was enacted because "many of the justifications for extensive regulation of railroad rates no longer existed."[6]

[5] *Western Coal Traffic League* v. *United States*, 719 F.2d 772, 775 (5th Cir.), *cert. denied*, 462 U.S. 1110 (1983). *See* 49 U.S.C. § 10709 (1985). In the *WCTL* case, the Fifth Circuit Court upheld the Commission's market dominance standards despite challenges by shipper interests.

[6] *WCTL* v. *United States*, 719 F.2d at 775.

By the 1980 Staggers Act, Congress further limited the Commission's substantive authority over rates. The act set jurisdictional thresholds by requiring a finding that given rates are in excess of the applicable "cost recovery percentage" before the Commission has authority to review the rates. If the rates do not exceed the "cost recovery percentage," then the rail carrier is presumed not to have "market dominance," and the Commission cannot determine the reasonableness of the rate. Even if the rate is above the threshold, the Commission must still determine whether market dominance exists before proceeding with reasonableness review. See 49 U.S.C. § 10709 (1985).[7]

Finally, the Staggers Act, which specifically authorized rail contract rates, provides that the Commission's very limited review of those rates does not ordinarily include review for "unreasonable discrimination." 49 U.S.C. §§ 10713(d), 10741(f) (1985). The Commission cannot, for instance, review coal transportation contracts for their discriminatory effect. *Id.* Contracts by their very nature lessen the need for regulatory supervision, assuming a modicum of equal bargaining power. Significantly, the conference report to the Staggers Act expressly affirms that "[t]he existing Federal antitrust laws apply" to section 208 of the Staggers Act, 49 U.S.C. § 10713, the section which authorized contract rates.[8]

The 4R and Staggers Acts, by deregulating rail rates, evince Congress' intent to allow "competition

[7] *See also WCTL* v. *United States*, 719 F.2d at 777 (Staggers Act, a "second major deregulation statute," was "an effort to hasten railroad rate deregulation").

[8] H.R. Rep. No. 1430, 96th Cong., 2d Sess. 101, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4110, 4133.

and the demand for services" to govern the setting of rail rates, "to the maximum extent possible." 49 U.S.C. § 10101(a)(1) (1985). The legislative history underlying the two acts shows the congressional purpose to supplant regulation with competition as the principal restraint on railroad pricing and the principal means for protecting the shipping public from railroad market power.

The conference report on the 4R Act states that the purpose of the Act is "to provide an extensive overhaul of railroad rate regulation. . . . The provisions eliminate needless or harmful regulatory constraints on railroads, and they prescribe ratemaking practices which will *encourage effective competition* and protect consumers."[9] Similarly, the conference report to the Staggers Act explains that:

> The Conferees find that historically the enactment of the Interstate Commerce Act was essential to prevent an abuse of monopoly power by railroads. . . . However, *today, most traffic is competitive* and many of the Government regulations affecting railroads have become unnecessary and inefficient.[10]

As to the application of the antitrust laws, the Senate Commerce Committee, reporting out its version of the 4R Act in 1975, wrote that:

> If the railroads are to be treated more as a competitive industry with respect to pricing, then the industry must be treated more like a competitive industry with respect to antitrust policy.[11]

[9] S. Rep. No. 595, 94th Cong., 2d Sess. 134, *reprinted in* 1976 U.S. Code Cong. & Ad. News 148, 149 (emphasis added).

[10] H.R. Rep. No. 1430, *supra*, at 79, 1980 U.S. Code Cong. & Ad. News at 4110-11 (emphasis added).

[11] S. Rep. No. 499, 94th Cong., 1st Sess. 14 (1975).

The conference report on the 4R Act notes that, while the market dominance limitations on ICC regulation would lead to more competitive pricing, the changes were not intended "to authorize or to be applied to permit predatory competitive conduct."[12] If deregu-

[12] S. Rep. No. 595, *supra*, at 134, 1976 U.S. Code Cong. & Ad. News at 149. For further evidence that Congress intended Staggers Act deregulation of rail rates to be accompanied by heightened application of the antitrust laws, *see To Reform the Economic Regulation of Railroads: Hearings on S. 796 Before the Subcommittee of Surface Transportation of the Senate Committee on Commerce, Science and Transportation*, 96th Cong., 1st Sess. 251 (1979) (statement of Robert E. Gallamore, Federal Railroad Administration) ("We expect to see railroads effectively regulated by market forces and where competition does not limit their power, they will continue to be subject to antidiscriminatory and predatory price provisions, as well as Federal antitrust laws"); *Id.* at 546-47, 1343 (Statements of Donald F. Flexnor, Deputy Assistant Attorney General, Antitrust Division, U.S. Dept. of Justice) (railroads subject to full effect of antitrust laws, with possible exception of the Robinson-Patman Act; predatory pricing by railroads may be a violation of the Sherman Act "as an attempt to monopolize"); *Id.* at 1325 (statement of David I. Wilson, Asst. Director, Bureau of Competition, Federal Trade Commission) (a "railroad which has monopoly power . . . is subject to Sherman Act § 2"); *Regulatory Reform Legislation for the Rail Industry: Hearings on H.R. 4650 Before the Subcommittee on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. 4 (1980) (statement of William B. Johnson, Asst. Sec. for Policy and International Affairs, Dept. of Transportation) ("[T]he antitrust laws apply fully to unapproved agreements, including agreements knowingly entered into that are beyond the scope of ICC approved agreements"); 126 Cong. Rec. 17792 (1980) (statement of Rep. Madigan, co-author of rail bill) ("Q. Are railroads subject to the antitrust laws? A. Yes, except in those well-defined areas which permit certain practices not generally permitted under the antitrust laws. For example, the interdependent nature of the railroad industry necessitates collective rate bureau agreements").

lation and competition are to work, then the antitrust laws must be enforced. Competition is to protect the shipper, and the antitrust laws are to protect competition.

In sum, Congress has removed a large portion of the statutory basis for the *Keogh* decision. Many rail rates are completely deregulated now. As long as a given rate is below the jurisdictional threshold, or as long as the railroad lacks market dominance, the rate the railroad prescribes is the rate allowed under the Interstate Commerce Act. Congress has decreed that, at least for most contract rates, there is no basis for a claim of discrimination.

II. Rail Rates Are No Longer Approved By The ICC

The Court's decision in *Keogh* was based on the conflict between the regulatory and antitrust regimes. The Court held simply that private treble damage actions could not be predicated on a challenge to rates *filed and approved* by the ICC, because such rates are presumptively lawful and "reasonable."[13] As the Court subsequently made clear in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 222 (1966), however, private antitrust actions are not precluded where an award of damages "would not interfere with any future action of the Commission." Antitrust exposure no longer interferes with ICC action on rail rates for most large volume movements. Congress has deregulated most of this business, and the ICC has followed Congress' lead with a vengeance.

[13] 260 U.S. at 160-61. *Accord, Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 491 n.8 (1968).

Large volume rail rates are negotiated, often over an extended period of time, with captive shippers rarely having much leverage in those negotiations. If the negotiations lead to a contract, that contract is signed and *filed* with the ICC, 49 U.S.C. § 10713(b) (1985). The briefest of summaries are published about such contracts, *see* 49 C.F.R. §§ 1039.3, 1300.313 (1983), and they are subject to challenge in only exceedingly limited circumstances, 49 U.S.C. § 10713(d) (1985). Unlike the rates that were "approved" in *Keogh*, contracts are not ordinarily even subject to ICC "approval."

Assuming the shipper and carrier cannot agree on a contract, the railroad eventually files a tariff. It is then up to the shipper to decide whether there are any possible grounds for challenging the rate and other terms. 49 U.S.C. § 10707 (1985). Coal shippers, at least, today almost invariably choose not to pursue challenges to rates before the ICC, for the simple reason that they have virtually no chance of prevailing.[14] As a result tariffs are often "filed" with the Commission; they are rarely "approved" and thus

---

[14] As ICC Administrative Law Judge Hopkins despairingly noted in a decision in January of 1984:

> Using the present method of arriving at a finding as to which carriers are revenue adequate it will be difficult if not impossible for any carrier to be considered revenue adequate. *It therefore does not appear presently feasible for a finding to be made that a complained of rate is unreasonably high.*
>
> • • •
>
> The Commission has not to my knowledge, since the passage of the Staggers Act, found a rate complained of to be above a maximum reasonable level.

Consumers Power Co. v. *Norfolk & Western Railroad Co.*, ICC Dkt. No. 378545, slip op. at 9-10 (January 4, 1984) (emphasis added).

rarely pose any conflict with ICC action to be avoided under the *Keogh* analysis.

The ICC has taken several steps to implement Congress' rate deregulation of coal rates, steps which further lessen the need for or chances of ICC "approval." The ICC, first, expansively defined competition for purposes of making market dominance determinations; the Commission allows consideration of product and geographic competition even where a given movement of, say, coal has no realistic competition. *See WCTL* v. *United States*, 719 F.2d 722. As a result shippers of coal, even between a specific mine and a specific powerplant, often are deemed to have competition and thus are not subject to market dominance.[15] The ICC has also endorsed "differential pricing" for rail rates, under which some rates are set at levels "exceeding fully allocated costs in order to compensate for those rates which must be set at less than fully allocated costs to meet competition from other transportation modes."[16] Differential pricing is a fact of life now at the ICC; the policy further restricts shipper challenges to rail rates, since it does away with shipper arguments that rates greatly above fully allocated costs are unfair or unreasonable.

---

[15] As a result the ICC determines that it does not have jurisdiction to review the reasonableness of the rates. *See* 49 U.S.C. § 10709 (1985). *See also Burlington Northern R. Co.* v. *I.C.C.*, 679 F.2d 934, 936 (D.C. Cir. 1982), *cert. denied*, —— U.S. ——, 104 S. Ct. 2150 (1984).

[16] *Potomac Electric Power Co.* v. *I.C.C.*, 744 F.2d 185, 193 (D.C. Cir. 1984), *quoting Houston Lighting & Power Co.* v. *United States*, 606 F.2d 1131, 1148 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980).

The ICC, finally, recently published its policy in *Coal Rate Guidelines, Nationwide.*[17] The Commission adopted "constrained market pricing" for coal rates, a variation of Ramsey pricing, and provided the coal railroads with further leeway in their demands for higher revenues. Under the Commission's new pricing formula, market forces determine the share of costs to be borne by different shippers, albeit with certain limited constraints imposed by the ICC. It is interesting to note that the Commission anticipates limited application of its *Coal Rate Guidelines,* for three reasons: (1) the Commission's rate jurisdiction is "circumscribed by statute" and "*less than 20 percent* of rail revenues from coal traffic are derived from traffic for which the revenue to variable cost ratio exceeds the jurisdictional threshold"; (2) traffic under contract is "not subject to Commission scrutiny"; and (3) section 229 of the Staggers Act, the grandfather clause, eliminates review of rates in effect prior to enactment of the Staggers Act.[18] With the Commission itself finding that only 20 percent of coal rail traffic is subject to reasonableness review, there is hardly cause for widespread concern over conflicts between Commission jurisdiction and antitrust actions.

---

[17] Ex Parte 347, (Sub-No. 1) slip op. (August 8, 1985), *appeal docketed sub nom. Consolidated Rail Corp.* v. *United States,* No. 81-3080 (3rd Cir.).

[18] *Id.*, slip op. at 3 (emphasis added).

CONCLUSION

Congress has told shippers to rely on competition to ensure the equity of rail rates. If shippers must rely on competition, then railroads ought to be forced to accept the implications of a deregulated marketplace, including heightened exposure to private antitrust suits. The Court should overturn or modify *Keogh* as a product of a different era in carrier rate regulation. The reasons for the ruling have largely disappeared.

Respectfully submitted,

FREDERICK L. MILLER, JR.*
PETER GLASER
CHARLES F. HOLUM

DUNCAN, WEINBERG & MILLER, P.C.
1775 Pennsylvania Avenue, N.W.
Suite 1200
Washington, D.C. 20006
(202) 467-6370

Attorneys for Western Fuels Association, Inc.

**Counsel of Record*

Dated: November 21, 1985